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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

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**BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,**
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

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Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed June 28, 1999

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

NO. 98-3222

BEVERLY ENTERPRISES, INC.;
DONALD L. DOTSON
Appellants

v.

ROSEMARY TRUMP;
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 585

On Appeal From the United States District Court For the Western District of Pennsylvania
(D.C. Civil Action No. 97-cv-01490)
District Judge: Honorable Gary L. Lancaster

Argued December 11, 1998

BEFORE: BECKER, Chief Judge, and STAPLETON, Circuit Judges, and HARRIS,* District Judge

(Opinion Filed June 28, 1999)

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* Honorable Stanley S. Harris, United States District Judge for the District of Columbia, sitting by designation.

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## OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

This diversity-based defamation action arises from statements allegedly made by a union representative about a company official during two separate incidents, one at a political rally and another at a "Town Hall meeting." The District Court dismissed the plaintiffs' complaint after finding the comments at the rally incapable of defamatory meaning and the Town Hall meeting comment protected under the doctrine of absolute testimonial immunity. Although for somewhat different reasons, we will affirm.

### I.

There is a long-standing and acrimonious relationship between Beverly Enterprises, a national provider of nursing home care, and the

Service Employees International Union (''SEIU'') whose local affiliates represent a substantial number of Beverly's employees. Plaintiffs are Beverly Enterprises and Donald L. Dotson, Beverly's Senior Vice President for Labor and Employment. Before joining Beverly Enterprises Dotson had a prestigious career in labor relations, serving as Chairman of the National Labor Relations Board and as Assistant Secretary for Labor-Management Relations at the U.S. Department of Labor. This suit arises from two incidents in which Rosemary Trump, President of Local 585 of the SEIU, allegedly made false and defamatory statements about Dotson and Beverly. Plaintiffs allege that, as a result of the statements uttered by Trump, Dotson and Beverly have suffered damage to their reputations. A district court's order dismissing a complaint is subject to plenary review. *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.,* 998 F.2d 1192, 1997 (3d Cir. 1993). We accept as true all well-pleaded factual allegations in the plaintiffs' complaint and all reasonable inferences therefrom. *Independent Enterprises v. Pittsburgh Water,* 103 F.3d 1165, 1168 (3d Cir. 1997). The parties agree that Pennsylvania law governs this dispute.

## II.

The first set of allegedly defamatory statements were made in August, 1996, at a political rally in Pittsburgh, Pennsylvania, sponsored by the Dole/Kemp presidential campaign. Plaintiffs allege that Trump approached Dotson in the midst of a large crowd, ascertained his identity as a Beverly official, and asked him whether he knew who she was. When Dotson said he did not, Trump became visibly upset, told Dotson he should know her, identified herself and then began to berate Dotson in a loud and angry voice. Specifically, Trump accused Dotson of being a ''criminal'' and said that ''you people at Beverly are all criminals.'' When Dotson tried to respond, Trump cut him off and angrily accused him of ''devoting [his] entire career to busting unions.'' Despite Dotson's efforts at reasoned discourse, Trump continued berating Dotson, finally shouting at him: ''I know your kind. You're just part of that World War II generation that danced on the graves of Jews.''

Plaintiffs allege that these statements were false and defamatory as to both Dotson and Beverly Enterprises. Moreover, they allege that Trump uttered the statements with actual malice, and that, as a result of these statements, Dotson suffered damage to his reputation. The District Court concluded that each of the three statements at the rally were incapable of defamatory meaning because they constituted mere hyperbole and insulting rhetoric, all too common in labor disputes.

We begin by addressing Trump's alleged statements accusing Dotson of "union-busting" and referring to Dotson and others at Beverly as "criminals." By statute in Pennsylvania a plaintiff in a defamation action has the burden of proving:

> (1) the defamatory character of the communication, (2) its publication by the defendant, (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication, and (7) abuse of any conditional privilege.

42 Pa. C. S. §8343(a) (West 1999).

The Pennsylvania Supreme Court has held that "[i]n an action for defamation, it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit." *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Id.* at 1055 (quoting *Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215 (Pa. 1981)).

Appellants contend that Trump's references to "criminals" and "union busting" were defamatory per se because they imputed criminal conduct to both Dotson and Beverly.[1] Moreover, they argue that other attendees at the Dole/Kemp rally within earshot could reasonably have interpreted Trump's statements as alleging actual facts about Dotson and Beverly.

We disagree. Although Trump's statements were undoubtedly offensive and distasteful, the law of defamation does not extend to mere insult. Courts in Pennsylvania and elsewhere have long recognized a distinction between actionable defamation and mere obscenities, insults, and other verbal abuse. "[S]tatements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are

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[1]Insofar as plaintiffs' allegations can be construed as alleging slander per se, plaintiffs are excepted from the requirement that they must also allege special damages. *Baird v. Dun & Bradstreet,* 285 A.2d 166, 171 (Pa. 1971); *Clemente v. Espinosa,* 749 F. Supp. 672, 677 (E.D. Pa. 1990) (construing Pennsylvania law).

not defamatory." *Kryeski v. Schott Glass Techn., Inc.*, 626 A.2d 595, 601 (Pa. Super. 1993) (quoting *Redding v. Carlton*, 296 A.2d 880, 881 (Pa. Super. 1972)); *see also Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6, 14 (1970) (finding that a statement that was "no more than rhetorical hyperbole, a vigorous epithet" was not slander). As the Restatement (Second) of Torts explains:

> A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case.

Restatement (Second) of Torts §566, comment e (1977).

Similarly here, Trump's exclamation that "you people at Beverly are all criminals" is reasonably understood as a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing. Trump's accusation that Dotson "devot[ed] [his] entire career to busting unions" is equally incapable of a defamatory construction. Appellants describe these statements as "mean-spirited . . . accusations of illegal and immoral conduct." First, it is doubtful at best that an accusation of "union-busting" amounts to an insinuation of criminal activity. Even if it were so understood, however, the reasonable listener would recognize this statement as merely a vituperative outburst which, although undoubtedly offensive, it is not actionable in defamation. On this basis, we conclude that these two statements are incapable of defamatory meaning and thus cannot support an action in tort.

Plaintiffs' claim based on the third comment Trump allegedly made at the rally — that Dotson was "part of that World War II generation that danced on the graves of Jews" — fails for a different reason. As a rule, except as to allegations of slander per se, plaintiffs in slander actions must allege special damages beyond an injury to reputation. 42 Pa. C. S. §8343(a)(6); *Baird*, 285 A.2d at 171 ("[i]t is a general rule that defamatory words are not actionable, absent proof of special damage"); *Solosko v. Paxton*, 119 A.2d 230, 232 (Pa. 1956) ("[g]enerally speaking, damages for defamatory words when spoken are not recoverable in the absence of proof

of special damages''); *Altoona Clay Prod. Inc., v. Dun & Bradstreet, Inc.*, 246 F. Supp. 419, 422 (W.D. Pa. 1965), *rev'd on other grounds,* 367 F.2d 625 (3d Cir. 1966) (''The Pennsylvania cases require both the allegation and proof of [a] specific item of damage to support the recovery.''); Restatement (Second) of Torts, §558(d). Whereas the aforementioned comments arguably impute criminal conduct to the plaintiff, and thus constitute allegations of slander per se, this accusation of bigotry does not fall within the narrowly defined categories of per se defamation. *Clemente,* 749 F. Supp. at 677 (citing the four categories of slander per se as words imputing the commission of a criminal offense, a loathsome disease, business misconduct, or serious sexual misconduct).

Consequently, as to the alleged statement imputing anti-Semitism, to survive a motion to dismiss, the plaintiff must go beyond a claim of injury to reputation and allege special damages. Typically considered as a pecuniary loss, special damages are ''actual and concrete damages capable of being estimated in money, established by specific instances such as actual loss due to withdrawal of trade of particular customers, or actual loss due to refusal of credit by specific persons, all expressed in figures.'' *Altoona*, 246 F. Supp. at 422; Restatement (Second) of Torts, §575, comment b (special harm is ''the loss of something having economic or pecuniary value''). Because plaintiffs have only alleged damage to their reputation, they have failed to meet this requirement.[2]

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[2]Beverly also argues that it need not allege or prove special damages because Trump acted with actual malice. But Beverly confuses the requirements of *special* damages and *actual* damages. Under Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages. *See Frisk v. News Co.,* 523 A.2d 347, 354 (Pa. Super. Ct. 1986) (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974)); *Agriss v. Roadway Express, Inc.,* 483 A.2d 456, 467-68 (Pa. Super. Ct. 1985). This rule requires that, in the absence of actual malice, even if the plaintiff need only prove general damage to reputation, as in a defamation per se case, he or she cannot rely on a presumption of damages; he or she must offer actual specific evidence of such general damages. This is different from the principle of special damages (proof of which is excused in defamation per se cases, *see Agriss,* 483 A.2d at 468-75.)

## III.

The second incident in which plaintiffs allege that Trump made a defamatory statement was in May, 1997, at a "Town Hall meeting." According to the plaintiffs' complaint, the SEIU persuaded several members of Congress to convene the meeting in the Allegheny County Courthouse to discuss an item of federal legislation then pending in Congress. The bill, entitled the "Federal Procurement and Assistance Integrity Act," was designed to preclude businesses that are in violation of certain federal labor standards from obtaining federal contracts. Plaintiffs allege that the "true purpose" of the meeting was to provide a forum for disparaging Beverly Enterprises and, to that end, members of Congress were importuned to ask speakers about the adverse effects that the pending legislation would have on Beverly. Trump, an invited speaker, allegedly made the following statement in response to a question from Congressman Klink:

> CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?
>
> MS. TRUMP: Well this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple effect in the entire industry and the whole industry will operate nonunion.

Plaintiffs allege that the italicized statement by Trump is defamatory because it accuses Dotson of criminal violation of the Ethics in

Government Act, 18 U.S.C. §§201 *et seq.* (''EGA''). Specifically, plaintiffs allege that the ''gist or sting'' of Trump's statement is that Dotson (1) may have negotiated for employment with Beverly while Chairman of the NLRB, and (2) eventually represented Beverly in matters that were pending before the NLRB during his Chairmanship, both in criminal violation of federal government ethics laws. Further, plaintiffs allege that Trump's statement also implicates Beverly as a participant in a criminal conspiracy with Dotson toward these same ends. According to plaintiffs, these statements are false, defamatory, and slanderous per se, as accusations of criminal conduct. On the basis of this statement, Dotson and Beverly claim to have sustained damage to their reputations.

The District Court dismissed this claim after concluding that Trump enjoyed absolute testimonial immunity for her statement. Like absolute judicial immunity, the common law testimonial immunity provides that:

> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

*See Jennings v. Cronin,* 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978) (quoting and adopting §590A of the Restatement (Second) of Torts). After considering the scope, purpose, and format of the meeting, the District Court concluded that the meeting constituted a ''legislative proceeding'' for purposes of testimonial immunity. Moreover, because Trump was an invited speaker and made the allegedly defamatory statement in response to a question posed by a panel member, the District Court concluded that the statement was ''part of'' the legislative proceeding. Finding Trump's statement absolutely privileged, therefore, the Court dismissed plaintiffs' claim.

We see no need to consider the contours of absolute testimonial immunity in this case, however, because we find Trump's statement at the Town Hall meeting incapable of either of the defamatory constructions plaintiffs allege.[3] Whether a reasonable listener could have construed

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[3]Plaintiffs contend that the District Court erred by considering matters outside the pleadings without converting defendants' motion into one for summary judgment. *See* Fed.R.Civ.P. 12(b). Specifically, plaintiffs contend the District Court erroneously considered a videotape of the meeting and a copy of the pending legislation at issue. Plaintiffs thus assert that ''Dotson

Trump's statements as defamatory is a question of law to be determined by the court. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir. 1978); *Thomas Merton Ctr.*, 442 A.2d at 215-16; Restatement (Second) of Torts, §614.

Plaintiffs allege that Trump's statement implicates Dotson and Beverly in violation of two separate provisions of the Ethics In Government Act. Construing the allegations in the complaint in the plaintiff's favor, as we must, we nonetheless find neither of these interpretations reasonable. First, the act prohibits an executive branch officer from "personally and substantially" participating in a quasi-judicial proceeding if the officer is

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and Beverly must be provided the opportunity to rebut the extrinsic materials relied on by the District Court, and discover Rule 56 evidence in support of their claims." Appellant's Brief at 23.

It is well-settled that in deciding a motion to dismiss, courts generally may consider only the allegations contained in the complaint, exhibits attached thereto, and matters of public record. *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). As the federal bill is a matter of public record, the District Court did not err in considering it before deciding defendants' motion to dismiss.

However, the District Court's opinion also reflects the Court's reliance on the videotape of the meeting, which was relevant to determining whether the meeting constituted a "legislative proceeding." For example, the District Court noted the relevance of several details only obtained from the videotape, such as one Congressman's opening words at the meeting, his reference to the meeting as a "field hearing," and the number of other members of Congress present as well as their relationship to the bill. Although "a court may consider an undisputedly authentic document that the defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document," such exception does not apply here. *See id.* This exception prevents "a plaintiff with a legally deficient claim [from surviving] a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Id.* In this case, however, defendants offered the videotape (and the District Court considered it) in support of their affirmative defense of testimonial immunity. Because the plaintiff was not given an adequate opportunity for discovery or to submit rebuttal evidence, we will treat the District Court's decision as a 12(b)(6) dismissal and will disregard the videotape of the meeting in conducting our plenary review of that decision. *See Indep. Enterprises*, 103 F.3d at 1168 n.2.

also negotiating prospective employment with an organization that has a financial interest in that proceeding. *See* 18 U.S.C. §208. Plaintiffs' complaint alleges that Trump's statement asserts a violation of this provision insofar as she said that "when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door. . . ." We find this interpretation of Trump's statement unreasonable. Not only is there nothing in Trump's statement to suggest that Dotson simultaneously sought employment from Beverly and supervised cases involving Beverly, but Trump's statement suggests to us just the opposite: that Dotson did not approach Beverly until *after* he left his government job.

Second, the Ethics in Government Act restricts former federal officers from representing another individual or entity in a matter formerly under the officer's supervision. *See* 18 U.S.C. §207. Plaintiffs contend that Trump accused Dotson of violating this provision when she said, "Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly . . . than me since I have been supervising them on behalf of the government . . . ." Trump's statement, according to plaintiffs, amounts to an accusation that Dotson violated §207 of the EGA "by representing Beverly in matters that had been pending before the NLRB during his Chairmanship." Again, we fail to see how a reasonable hearer of the statement Trump allegedly made could interpret it as plaintiffs suggest.

Trump's statement undeniably implies that Dotson sought to capitalize on his knowledge of the NLRB's prosecutions of Beverly in an effort to obtain employment with Beverly. Moreover, given that Dotson was a Beverly Vice President at the time of the alleged statement, Trump's statement implies that Dotson successfully secured his job at Beverly on the basis of his knowledge of their ongoing litigation with the NLRB. However, none of these implications amounts to a violation of federal law — civil or criminal. Trump's comment simply does not state or imply that Dotson has done that which the EGA prohibits: making, with an intent to influence, a communication to or appearance before any department, agency, or court in connection with matters he previously supervised. *See* 18 U.S.C. 207(a)(2).

Unless Trump's statement is reasonably susceptible of a defamatory meaning, plaintiffs have failed to state a claim with respect to the Town

Hall meeting. *See Sarkees v. Warner-West Corp.*, 37 A.2d 544, 546 (Pa. 1944) ("If the words are not susceptible of the meaning ascribed to them by the plaintiff, and do not sustain the innuendo, the case should not be sent to a jury."); *McAndrew v. Scranton Republican Pub. Co.*, 72 A.2d 780, 783 (1950). We conclude that Trump's statement is incapable of conveying either of the defamatory meanings plaintiffs advance. Moreover, to the extent the statement is susceptible of another defamatory interpretation that does not constitute an accusation of criminal wrongdoing, such interpretation would not constitute slander per se and, as a result plaintiff's complaint would be insufficient for failure to allege special damages.

## IV.

Accordingly, we will affirm the order of the District Court dismissing the plaintiffs' complaint for failure to state a claim.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BEVERLY ENTERPRISES, INC.
and DONALD L. DOTSON,
Plaintiffs,

v.

ROSEMARY TRUMP and THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 585,
Defendants

Civil Action No. 97-1490

## MEMORANDUM

LANCASTER, J.

March 5, 1998

This is an action in defamation. Plaintiffs, Beverly Enterprises Inc. ("Beverly"), and its Senior Vice-President for Labor and Employment, Donald L. Dodson, allege that defendant, Rosemary Trump, defamed them on two separate occasions: first, at a political rally for the Dole-Kemp presidential campaign in August, 1996; and second, at a Town Hall meeting at the Allegheny County Courthouse in May, 1997. Plaintiffs seek money damages.

Defendants have filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Defendants contend that the statements Ms. Trump allegedly made at the Dole-Kemp rally are, as a matter of law, incapable of defamatory meaning. They further contend that the statements she made at the Town Hall meeting enjoy absolute testimonial immunity.

For the reasons that follow, the motion will be granted.

### I. STANDARD OF REVIEW

When the court considers a Rule 12(b)(6) motion to dismiss, the issue is not whether the plaintiff will prevail in the end or whether recovery appears to be unlikely or even remote. The issue is limited to whether, when viewed in the light most favorable to the plaintiff, and with all well-pleaded factual allegations taken as true, the complaint states any valid claim for relief. *See ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994).

In deciding a 12(b)(6) motion to dismiss, courts consider the allegations contained in the complaint, exhibits attached to the complaint, and matters of public record. *See* 5A Wright & Miller, *Federal Practice and Procedure* § 1357 n.40. A court may also consider any irrefutably authentic documents that a defendant attaches as an exhibit to the motion to dismiss if the plaintiff's claim is based in whole or in part on the documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Accordingly, in deciding defendants' motion, the court has considered, in addition to plaintiffs' complaint, a copy of the Federal Procurement and Assistance Integrity Act ("HR 1624"). The court has also considered a video-tape of the May, 1997, Town Hall meeting at which Ms. Trump is alleged to have made some of the defamatory statements on which plaintiffs' claim is based. Both of these items were attached to the motion to dismiss.

## II. DISCUSSION

### A. The Dole-Kemp Rally

These defamation claims stem from a long-standing acrimonious labor dispute between Beverly, the nation's largest private provider of nursing home care, and the Service Employees International Union ("SEIU"), whose local affiliates represent a substantial number of Beverly's employees. Rosemary Trump is the president of Local 585 of the SEIU. The dispute has led to a series of strikes, lockouts, and the filing of charges and counter charges of unfair labor practices with the National Labor Relations Board. Defendants contend that the statements Ms. Trump allegedly made at the Dole-Kemp rally were uttered in the midst of the labor dispute, were mere rhetorical insults not to be taken literally, and are not actionable as defamation. The court agrees.

In a defamation claim, the court must first determine, as a matter of law, whether the publication is capable of defamatory meaning. *See Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215-16 (Pa. 1981). The burden is on the complaining party to establish that the publication being challenged is defamatory. If the court concludes that the publication is not capable of defamatory meaning, the case will be dismissed. *See MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996).

Pertinent here, is that the courts recognize that there is a difference between defamatory statements, which are actionable in tort, and mere obscenities, insults, or other verbal abuse, which are not. *See Kryeski v. Schott-Glass Tech.*, 622 A.2d 595, 601 (Pa. Super. Ct. 1993). The courts generally consider insults, uttered face-to-face in anger, to be incapable of defamatory meaning. Indeed:

> There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult.

Restatement (Second) of Torts § 566 cmt. e (1976). This is particularly true in cases where the insults were uttered in the midst of an acrimonious labor dispute. *See Old Dominion Branch No. 496 Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974) (not defamation to refer to non-union worker as "scab," and to characterize him, among other things, as a "traitor to his God, his country, his family, and his class"); *Crawford v. United States Steelworkers*, 335 S.E.2d 828, 839 (Va. 1985) (not defamation to refer to management as "cocksucker" and "motherfucker"); *Yeager v. Local Union 20*, 453 N.E.2d 666, 667, 669 (Ohio 1983) (not defamation to refer to employer as a "Little Hitler" operating a "Nazi concentration camp").

In this case, the parties agree that the Dole-Kemp rally was held in the midst of the ongoing and long-standing acrimonious labor dispute between Beverly and the SEIU. Further, accepting plaintiffs' allegations as true, Ms. Trump, without provocation, angrily confronted Mr. Dodson at the rally. The confrontation escalated to the point where she shouted insults at Mr. Dodson and accused him of being a criminal by saying, "You people at Beverly are all criminals." She then accused Dodson of "devoting [his] entire career to busting unions." Finally, she shouted at Dodson, "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

We need not dwell on this issue at length. Ms. Trump's statements, distasteful as they were, were mere hyperbole and insulting rhetoric that are

unfortunately commonplace in labor disputes. It is unreasonable, within the context of the labor dispute, to find that any person would have understood that these statements were to be taken literally. [1] The statements made by Ms. Trump at the Dole-Kemp rally, in the context of their publication, rise no higher than rhetorical hyperbole uttered in the heat of anger and stemming from an ongoing labor dispute. They are incapable of defamatory meaning as a matter of law.

**B. The Town Hall Meeting**

Defendants also move to dismiss plaintiffs' claim with respect to statements that Ms. Trump made at the May, 1997, Town Hall meeting. Defendants contend that her statements enjoy absolute testimonial immunity. The dispositive issue court must decide is whether the Town Hall meeting was a legislative proceeding within the meaning of the Restatement (Second) of Torts §590A (1976). The court concludes that it was.

Plaintiffs' defamation claim is based on Pennsylvania law; therefore, we look to Pennsylvania law to determine whether defendants' immunity defense is valid. *See Lunderstadt v. Colafella*, 885 F.2d 66, 74 (3d Cir. 1989). Pennsylvania has adopted section 590A of the Restatement (Second) of Torts as its common law. *See Jennings v. Cronin*, 389 A.2d 1183 (Pa. Super. Ct. 1978). That section provides, "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding." *Id.* at 1185. This testimonial immunity is absolute and similar in all respects to that afforded a witness in a judicial proceeding. *See id.*; Restatement (Second) of Torts §590A cmt. a (1976).

The purpose of affording absolute immunity to witnesses who appear before a legislative proceeding is to permit the witnesses to give their legislators fully candid testimony regarding the advisability of proposed legislation. The immunity permits them to do so without the inhibiting or chilling effect that the threat of being hauled into civil court

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[1] If we accept that Ms. Trump plainly accused Dodson of being anti-Semitic, the Pennsylvania courts have been consistent in holding that an allegation of bigotry is, without more, not actionable in defamation. Plaintiffs' reliance on the obvious dicta in *MacElree* does not support their claim. *See* 674 A.2d at 1055 (Cappy, J., concurring).

on a defamation suit would pose. The value of the privilege to our representative form of government is obvious, necessary, and substantial.

What constitutes a legislative proceeding, however, is not clearly defined. What is clear, however, is that a legislative proceeding is not limited to those proceedings that embody the formal speech and debate on proposed legislation that is held on the floor of the legislative chamber. *See Lunderstadt*, 885 F.2d at 73 (''Legislative immunity is not limited to words spoken in legislative sessions.''). Nor is a legislative proceeding limited to an official hearing called by a legislative body, or by duly formed committees of that body, where witnesses are compelled to appear and testify under oath. *See Yip v. Pagano*, 606 F. Supp. 1566, 1570 (D.N.J. 1985) (citing authority).

Neither the Supreme Court of Pennsylvania nor the Court of Appeals for the Third Circuit has directly ruled on what constitutes a ''legislative proceeding.'' We find, however, some guidance in the court of appeals' decision in *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3d Cir. 1985). In *Lee*, the court of appeals held that informal investigative fact-finding is included within the type of activity protected by legislative immunity. *See id.* at 520-22. In so holding, the court of appeals made clear that ''fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity.'' *Id.* at 521. Although *Lee* was based on a specific statute that afforded immunity to the Virgin Islands' legislators, the court's reasoning is instructive in this case. *See also Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) (noting that the power to investigate falls within the legislative sphere and is protected).

After a review of the applicable authorities, the court holds that the definition of a legislative proceeding is broad enough to encompass proceedings — including informal factfinding, information gathering, or investigative activities — that are conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation.

In this case, the Town Hall meeting was held in the Allegheny County Courthouse. The stated purpose of the meeting was to allow the local members of Congress to hear testimony regarding the utility of HR 1624, which was then pending before the United States Congress, and how adoption of HR 1624 might affect Beverly's operations. HR 1624, if

adopted, would authorize the Secretary of Labor to suspend or debar a business from being awarded a procurement contract with the federal government if it were determined that the business had violated, among other provisions, the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Indeed, Representative William J. Coyne opened the meeting by referring to it as a "field hearing" and stated, "This hearing should provide us with a better understanding of the nature and magnitude of the problem, as well as the best options for dealing with federal contractors who have long histories of violating federal labor and workplace safety laws."

Representative Lane Evans, who drafted HR 1624, presided at the Town Hall meeting. In addition to Representative Evans, the congressional panel consisted of Representatives William J. Coyne, Michael F. Doyle, Frank Mascara, and Ronald Klink, all of whom were co-sponsors of HR 1624. United States Senator Arlen Spector also attended a portion of the meeting.

Thirteen individuals were invited to speak before the panel. The speakers included, among others, labor leaders, workers, attorneys, and educators. In accordance with the meeting's general format, each of the congressmen made an opening statement regarding the scope and intent of HR 1624. Each of the witnesses then gave prepared remarks, and thereafter, responded to specific questions from the congressional panel.

We have considered each of plaintiffs' arguments regarding the immunity issue. Moreover, we accept as true plaintiffs' averment that the Town Hall meeting was not a meeting of the congressional committee that was assigned the task of considering HR 1624. We also accept as true that none of the congressmen in attendance were members of the assigned committee. We find, however, that these averments are immaterial to the immunity issue, and are therefore insufficient to withstand defendants' motion to dismiss.

Nor is the court persuaded by plaintiffs' contention that Fed.R.Civ.P. 12(b)(6) dictates that the court accept as true the averment made in plaintiffs' complaint that the Town Hall meeting was not a legislative proceeding. Rule 12(b)(6) obligates the court to accept as true plaintiffs' averments of fact, but the court is not obligated to adopt plaintiffs' conclusions of law. Whether the Town Hall meeting was a legislative proceeding within the meaning of section 590A is a question of law; thus, plaintiffs' averment enjoys no presumption of validity.

The court is satisfied that the Town Hall meeting was a legislative proceeding within the meaning of section 590A of the Restatement. The court is also satisfied that Ms. Trump's statements were made as a part of that legislative proceeding. She was one of the thirteen individuals who were invited to speak before the congressional panel. She gave a statement and then answered questions from the panel. The statement that plaintiffs find objectionable was clearly relevant to the stated purpose of the meeting; indeed, it was made in direct response to a question posed by Representative Klink.

Moreover, contrary to plaintiffs' contention, it does not matter whether Ms. Trump had a subjective sinister motive for taking part in the Town Hall meeting. Testimonial immunity is absolute, it stands even if the witness acted in bad faith, or with a corrupt motive. *See Lunderstadt*, 885 F.2d at 74 (noting that statements made with an unworthy purpose in a legislative proceeding do not destroy legislative immunity and that courts are not the proper place to sort out controversies surrounding dishonest or vindictive motives attributed to legislative conduct).

## III. CONCLUSION

The motion to dismiss will be granted. The appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BEVERLY ENTERPRISES, INC.
and DONALD L. DOTSON,
Plaintiffs,

*v.*

ROSEMARY TRUMP and THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 585,
Defendants.

Civil Action No. 97-1490

**ORDER**

AND NOW, this 5th day of March, 1998, upon consideration of the motion to dismiss [Document #3], IT IS HEREBY ORDERED that the motion is GRANTED. The Clerk of Court is directed to mark the case closed.

BY THE COURT:

_____, J.

cc: All Counsel of Record

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BEVERLY ENTERPRISES, INC., ET AL.,
Plaintiffs,

v.

ROSEMARY TRUMP, ET AL.,
Defendants

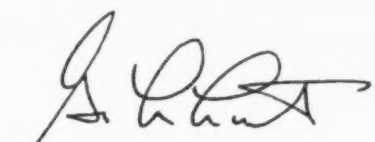
Civil Action No. 97-1490

**ORDER**

AND NOW, this 9th day of February, 1998, IT IS HEREBY ORDERED as follows:

1. Civil Action No. 97-2356 is consolidated with Civil Action No. 97-1490, the lead case captioned above.
2. All pleadings, motions, and other papers hereafter filed shall be filed at Civil Action No. 97-1490.
3. The Clerk of Court shall close Civil Action No. 97-2356.

BY THE COURT:



_____, J.

cc: All Counsel of Record

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

No. 98-3222

BEVERLY ENTERPRISES, INC.; DONALD L. DOTSON,
*Appellants*

v.

ROSEMARY TRUMP; SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
(D.C. Civ. No. 97-cv-01490)

Present: BECKER, *Chief Judge,* SLOVITER, MANSMANN
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH
McKEE, RENDELL, STAPLETON,* *Circuit Judges,* and
HARRIS,* *District Judge.*

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**SUR PETITION FOR PANEL REHEARING**
**WITH SUGGESTION FOR REHEARING *EN BANC***

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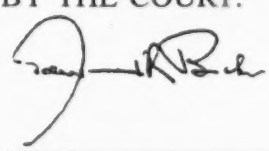
The petitions for rehearing filed by the Appellants and having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petitions for rehearing are

DENIED.

BY THE COURT:



Chief Judge

DATED: July 30, 1999
gs/cc: MTM
CD
HCB
KWK

*As to panel rehearing only.

**United States Constitution, Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

## NATIONAL LABOR RELATIONS ACT

### 29 U.S.C. § 151 Findings and Policies

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection of law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

## 29 U.S.C. § 158(c)

Section 8.(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

## ETHICS IN GOVERNMENT ACT
## 18 U.S.C. § § 207, 208, 216

**§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches**

**(a) Restrictions on all officers and employees of the executive branch and certain other agencies.** (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —

> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) in which the person participated personally and substantially as such officer or employee, and
>
> (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —

(A) in which the United States . . . is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

* * *

**(c) One-year restriction on certain senior personnel of the executive branch and independent agencies.** (1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

**§ 208. Acts affecting a personal financial interest**

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . in which, to his knowledge, any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

> Shall be subject to the penalties set forth in section 216 of this title.

**§ 216. Penalties and injunctions**

(a) The punishment for an offense under section . . . 207, 208 . . . of this title is the following:

> (1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.
>
> (2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

(b) The Attorney General may bring a civil action . . . against any person who engages in conduct constituting an offense under section . . . 207, 208 . . . of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BEVERLY ENTERPRISES, INC.
5111 Rogers Avenue
Fort Smith, Arkansas 72919,

and

DONALD L. DOTSON
5111 Rogers Avenue
Fort Smith, Arkansas 72919,
Plaintiffs,

v.

ROSEMARY TRUMP
237 Sixth Street
Pittsburgh, Pennsylvania 15218,
Defendant.

Civil No.: 97 1490

## COMPLAINT FOR DAMAGES

NOW COME the Plaintiffs Beverly Enterprises, Inc. and Donald L. Dotson and, for their Complaint against Defendant Rosemary Trump, state as follows:

## PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Beverly Enterprises, Inc. (hereinafter "Beverly") is a corporation with its principal place of business located at 5111 Rogers Avenue, Fort Smith, Arkansas.

2. Plaintiff Donald L. Dotson (hereinafter "Dotson") is an individual of the full age of majority and a resident of the State of Arkansas.

3. Defendant Rosemary Trump (hereinafter "Trump") is, upon information and belief, an individual of the full age of majority and a resident of the State of Pennsylvania. While Trump, at all times relevant to the facts giving rise to this dispute, served as President of Local 585, Service Employees International Union, she is being sued only as an individual for acts taken in her personal capacity and not in her official capacity as President of SEIU Local 585.

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1332 in that complete diversity of citizenship exists between all Plaintiffs and all

Defendants and the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

5. Venue is proper in this Court pursuant to 28 U.S.C. §1391(a)(1) in that the Defendant resides in this judicial district and pursuant to 28 U.S.C. §1391(a)(2) in that a substantial portion of the events or omissions giving rise to this action occurred within this judicial district.

## GENERAL BACKGROUND ON BEVERLY AND THE SEIU

6. Beverly is the nation's largest private provider of nursing home care.

7. Beverly and the Service Employees International Union (hereinafter "SEIU") have been embroiled in a long-standing dispute over the SEIU's local affiliates' representation of Beverly employees. The dispute finds its origins in the mid-1980s when the SEIU first targeted Beverly homes for unionization.

8. During the course of its efforts to unionize Beverly employees, the SEIU has filed innumerable unfair labor practice charges against Beverly with the National Labor Relations Board (hereinafter "NLRB"). Included among these were a series of charges dating back to 1986 that led to a decision by the NLRB in *In re Beverly California Corp.*, 310 NLRB No. 37 (1993), commonly known as "Beverly I". The Administrative Law Judge rendered his decision in Beverly I on November 9, 1990. The NLRB issued its decision on January 20, 1993. The Second Circuit, in *Torrington Extend-A-Care Employee Assoc. v. National Labor Relations Board*, 17 F.3d 580 (2d Cir. 1994), reversed the NLRB's decision and remanded the case for further proceedings on February 28, 1994.

9. After realizing that traditional union activities would not be effective in its dealings with Beverly, the SEIU, during the 1980s, decided to launch a "corporate campaign" against Beverly. Such campaigns are designed to use external pressure on a company and its top policy-makers through non-traditional union tactics in order to influence the company's strategic business decisions.

10. Among the many tactics used in a corporate campaign are attacks on the management of the company designed to discredit the company. In the case of Beverly, in addition to its efforts to impugn management, the SEIU has falsely portrayed Beverly as anti-worker, anti-consumer, unsafe and greedy; appealed to government agencies to investigate alleged bad

practices; petitioned legislators to bring political pressure to bear upon the company; and used media strategies to encourage repetition of false and defamatory articles.

11. The SEIU's goals in implementing its corporate campaign against Beverly were two-fold. First, the SEIU wanted Beverly to capitulate into recognizing its local affiliates, without representation elections conducted by the NLRB and to deprive Beverly employees of their right to choose freely whether they wish to be represented by the SEIU. Second, the SEIU wanted to bring economic pressure to bear on Beverly using non-traditional means to coerce Beverly into agreeing to terms and conditions of collective bargaining agreements that Beverly would not otherwise have agreed to in the face of traditional labor pressures such as strikes.

## BACKGROUND ON BEVERLY AND THE SEIU IN PENNSYLVANIA

12. Beverly subsidiaries own and/or operate forty-two nursing home facilities in Pennsylvania. Of those forty-two nursing homes, twenty have employees that are represented by local affiliates of the Service Employees International Union, either District 1199P, Local 585, and Local 688.

13. The last of the Collective Bargaining Agreements covering Beverly's unionized Pennsylvania nursing homes expired on November 30, 1995. Following the expiration of those agreements, Beverly and the SEIU engaged in collective bargaining, but initially were unable to agree on the terms and conditions of new Collective Bargaining Agreements. During these negotiations, the SEIU continued to wage its corporate campaign against Beverly in an effort to force Beverly to agree to terms proposed during the negotiations.

14. One of the principal aims of the SEIU during these negotiations was to obtain a master contract that would apply to all unionized Beverly homes in Pennsylvania. Beverly was not amenable to this proposal, preferring instead to have individual agreements that were tailored to suit the specific needs of each facility. Indeed, since early Fall of 1995, each Beverly unionized facility had in place a negotiating team that repeatedly sought facility-specific negotiations. Notwithstanding, the SEIU appointed one Chief Negotiator for all twenty facilities, had a "state-wide" bargaining committee composed of approximately 100 representatives from all twenty facilities, and avowedly sought a "Master Contract" to cover all twenty facilities.

15. On March 15, 1996, the SEIU gave notice to Beverly of its intention to engage in a three-day strike. Although the ostensible basis for the strike was to protest unfair labor practices, the three-day strike was, in fact, simply another component of the SEIU's corporate campaign and was done principally in the hope that it would force Beverly to accede to the SEIU's demands at the bargaining table.

16. Under §8(g) of the National Labor Relations Act, the SEIU was required to give ten days advance notice of its intended strike so that Beverly could make arrangements for temporary employees to ensure that essential health care services to its residents were not adversely affected by the strike.

17. The notice initially received by Beverly indicated that the strike would commence at 7:00 a.m. on Friday, March 29, 1996. Subsequently, at the last minute, on Wednesday, March 27, 1996, Beverly received notice that the commencement of the strike had been postponed until 6:00 a.m. on Monday, April 1, 1996. The sudden change interfered with the arrangements that Beverly had made for temporary employees. In addition, because the second notice arrived only five days before the strike, it failed to provide the required ten-days notice and thus the strike was unlawful. Beverly advised the SEIU that the second notice did not fulfill the requirements of §8(g) and that it would consider any strike held pursuant to the second notice to be unlawful. Despite Beverly's lack of consent to the notice, on April 1, 1996, at 7:00 a.m., fifteen of the twenty unionized facilities were struck.

18. Once the strike commenced, Beverly engaged permanent replacement workers in order to ensure that critical health care services were not interrupted to its residents or their welfare jeopardized during the strike. At the conclusion of the strike, when the strikers offered to return to work, Beverly concluded that it was more appropriate from a business standpoint for the replacement workers to remain in their positions and for the company to recall former workers on an as-needed basis. Between April, 1996 and January, 1997, Beverly recalled approximately 290 of the strikers to their former positions and another 237 were recalled to different positions.

19. Nevertheless, on July 8, 1996, the NLRB filed a §10(j) injunction action against Beverly, seeking an order directing it to recall all of the strikers to their former positions. On April 4, 1997, the United States District Court for the Western District of Pennsylvania concluded that

Beverly should, in fact, recall the former strikers. That decision is now on appeal to the United States Court of Appeals for the Third Circuit.

20. After extensive negotiations, Beverly and the SEIU were able to reach agreement in early June, 1997, on new Collective Bargaining Agreements at all of the twenty Beverly nursing homes with employees represented by the SEIU. Beverly, however, continues to remain the target of a corporate campaign by the SEIU.

## BACKGROUND ON DOTSON AND THE ETHICS IN GOVERNMENT ACT

21. In 1982, Dotson was nominated by President Ronald W. Reagan to serve as Chairman of the NLRB. On February 18, 1993, the United States Senate confirmed Dotson's nomination, and he assumed his duties immediately thereafter.

22. Prior to his nomination to be Chairman of the NLRB, Dotson had served as Assistant Secretary of Labor for Labor-Management Relations, United States Department of Labor. Before entering government service, Dotson had been Chief Labor Counsel for Wheeling-Pittsburgh Steel Corporation, Labor Counsel for Westinghouse Electric Corporation, and Labor Counsel for Western Electric Company.

23. As an employee of the federal government, Dotson was subject to the provisions of the Ethics in Government Act, which is codified in part at 18 U.S.C. §§ 207, 208, and 216. Among other things, the Act imposes restrictions in the scope of former government employees' post-government service employment. In particular, the Act permanently prohibits former government employees from knowingly making appearances before any government representative or agency in matters on which the former employee was personally and substantially involved; prohibits former government employees for a period of two years from knowingly making appearances before any government representative or agency in a matter that was pending under the former employee's official responsibility for the one-year period prior to his departure from government service; restricts senior employees of the executive branch for one year after they leave government service from knowingly making appearances before any government representative or agency in which the former employee seeks official government action; and restricts the conditions under which government employees may negotiate for post-government employment. Viola-

tions of the Act are felonies, punishable by up to five years imprisonment for a willful violation and a fine up to $50,000.00.

24. In their current form, those provisions provide in pertinent part as follows:

**§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches**

> **(a) Restrictions on all officers and employees of the executive branch and certain other agencies.** (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) in which the person participated personally and substantially as such officer or employee, and
> >
> > (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —

> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such

officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and

(C) which involved a specific party or specific parties at the time it was so pending.

shall be punished as provided in section 216 of this title.

***

(c) **One-year restriction on certain senior personnel of the executive branch and independent agencies**. (1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

**§ 208. Acts affecting a personal financial interest**

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . in which, to his knowledge, any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest —

Shall be subject to the penalties set forth in section 216 of this title.

**§ 216. Penalties and injunctions**

(a) The punishment for an offense under section . . . 207, 208 . . . of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

> (2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.
>
> (b) The Attorney General may bring a civil action . . . against any person who engages in conduct constituting an offense under section . . . 207, 208 . . . of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

25. Dotson's tenure as Chairman of the NLRB ended on December 16, 1987.

26. Dotson entered the private practice of law as a partner with Keck, Mahin & Cate in Washington, D.C. on December 17, 1987.

27. In May, 1991, Dotson accepted employment with Beverly as its Vice-President and Deputy General Counsel and subsequently became its Senior Vice-President for Labor and Employment.

28. At all times relevant to the events described hereinafter, Dotson continued in his capacity as Beverly's Senior Vice-President for Labor and Employment.

## COUNT I — THE DOLE/KEMP RALLY

29. Plaintiffs incorporate, as if rewritten herein in full, the allegations of Paragraphs 1 through 28, inclusive.

30. On Sunday, August 18, 1996, Defendant Trump confronted Dotson in Point State Park in Pittsburgh, Pennsylvania where a large crowd had gathered for a rally attended by Republican presidential candidate Bob Dole and vice-presidential candidate Jack Kemp.

31. Trump approached Dotson; ascertained that he was with Beverly; ascertained his identity; inquired as to whether Dotson knew who she was; and became visibly upset and irate when Dotson said he did not know who she was.

32. Trump told Dotson that he should have known who she was and then identified herself as Rosemary Trump, President of SEIU Local 585. Unprovoked, she then began to berate Dotson in a loud and angry voice,

easily overheard by other people nearby. Trump accused Dotson of being a "criminal" and said that "you people at Beverly are all criminals".

33. Without raising his voice, Dotson attempted to respond to Trump's loud accusations. Trump cut him off and angrily accused him of "devoting (his) entire career to busting unions".

34. Trump was resistant to reasoned discourse by Dotson in response to her accusations. She would not shut up, and she would not go away. Finally, she shouted at Dotson:

> "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

35. Trump's statements concerning Dotson are false and defamatory and imply false and defamatory statements of fact concerning Dotson.

36. The gist of Trump's defamation against Dotson is that he is anti-Semitic; that he is a criminal; and that he has devoted his entire professional career to illegal and criminal conduct, the purpose of which is to "bust" unions.

37. Trump's defamatory statements about Dotson were made without privilege, either statutory or constitutional in nature.

38. Trump's defamatory statements concerning Dotson are not protected expressions of opinion because they are based on the existence of objectively provable facts, and even if Trump's statements were considered "opinion", they are nevertheless actionable because they imply the existence of undisclosed defamatory facts.

39. Trump acted with constitutional malice in making the defamatory statements at issue in that she made such statements either with actual knowledge of the falsity of those statements, or with reckless disregard as to the truth of those statements.

40. Based on the foregoing, Dotson has suffered damage to his reputation and good name as a direct and proximate result of Trump's malicious, defamatory statements, all in an amount to be established at the trial of this matter.

41. Trump's defamatory statements about Dotson were spoken willfully, maliciously, in bad faith with ill will, wantonly and recklessly, and with actual malice.

## COUNT II — THE TOWN HALL MEETING

42. Plaintiffs incorporate, as if rewritten herein in full, the allegations of Paragraphs 1 through 41, inclusive.

43. The SEIU persuaded several members of the minority Democratic party in the United States Congress to whom it has given support in the past to convene a ''town hall'' meeting in the Allegheny County Courthouse to hear unsworn statements concerning H.R. 1624, the ''Federal Procurement and Assistance Integrity Act'', a bill proposed by the ranking minority member of the House Veterans Affairs Committee.

44. The true purpose of this ''town hall'' meeting was to provide a forum designed solely to attack Beverly and assist the SEIU in their campaign to cause economic harm to Beverly and its nursing homes in Pennsylvania.

45. This ''town hall'' meeting was not an official Congressional hearing, but was given the trappings of one to mislead the public, and was simply an informal meeting organized by the SEIU and several members of the minority party in Congress to hear statements from invited speakers on how H.R. 1624 would affect Beverly's existing contracts with the Veteran's Administration and why causing economic harm to Beverly would be a good thing for the SEIU.

46. Defendant Trump was one of the persons invited to appear and speak during the ''town hall'' meeting.

47. During the ''town hall'' meeting, Trump delivered a statement and responded to questions from the Members of Congress in attendance.

48. Among the questions to and answers by Trump was the following:

CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?

MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations was appointed, the former Chairman, Don*

*Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple affect in the entire industry and the whole industry will operate nonunion.

That's my opinion, of course. I can't obviously produce any evidence to that effect, but the reality is that since the former Chairman of the National Labor Relations Board, Don Dotson, and the former general counsel of the National Right to Work Committee was hired by Beverly in the last three-year period, it's been very clear that this is not about business, this is about ideology and the ideology is, frankly, is to pretend that the National Labor Relations Act passed in 1935 never happened. (Emphasis added).

49. The "gist" or "sting" of Trump's statements concerning Dotson include that Dotson may have negotiated for employment with Beverly during his tenure as Chairman of the NLRB in criminal violation of federal ethics laws described above and that Dotson, following his departure from government employment, engaged in criminal activities prohibited by federal ethics laws by representing Beverly in matters that had been pending before the NLRB during his Chairmanship in violation of federal ethics laws described above.

50. The "gist" or "sting" of Trump's statements concerning Beverly include that Beverly itself engaged in and/or aided and abetted a criminal conspiracy by helping Dotson to engage in criminal activities in violation of federal ethics laws described above.

51. Trump's statements concerning the circumstances of Dotson's employment with Beverly and Beverly's employment of Dotson are false and defamatory and/or imply false and defamatory statements of fact concerning Dotson and Beverly.

52. Trump's statements accuse Dotson and Beverly of criminal conduct in violation of the Ethics in Government Act as described above and, as such, are defamatory *per se* under applicable Pennsylvania law.

53. Trump's statements were made without privilege, be it statutory, common law, or constitutional in nature.

54. Trump's defamatory statements concerning Dotson are not protected expressions of opinion because they are based on the existence of objectively provable facts, and even if Trump's statements were considered "opinion", they are nevertheless actionable because they imply the existence of undisclosed defamatory facts.

55. Trump's statements were made to members of Congress, media and the general public assembled at the "town hall" meeting and were understood by those recipients to be of and concerning Dotson and Beverly. Furthermore, the recipients understood the defamatory meaning of Trump's statements.

56. Trump acted with constitutional malice in making the defamatory statements at issue, in that she made such statements either with actual knowledge of the falsity of those statements or with reckless disregard as to the truth of those statements.

57. Based on the foregoing, Dotson and Beverly have sustained damage to their reputation and good name in an amount to be established at the trial of this matter.

58. Trump's defamatory statements about Dotson and Beverly that were done willfully, maliciously, in bad faith, with ill will, wantonly and recklessly, and with actual malice.

**WHEREFORE,** Plaintiffs Donald L. Dotson and Beverly Enterprises, Inc. respectfully request that this Honorable Court grant them the following relief:

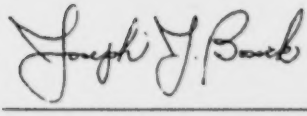
I. As to Count I, judgment in favor of Plaintiff Donald L. Dotson and against Defendant Rosemary Trump in a sum in excess of $75,000.00, plus legal interest and costs;

II. As to Count II, judgment in favor of Plaintiff Donald L. Dotson and against Defendant Rosemary Trump in a sum in excess of $75,000.00, plus legal interest and costs;

III. As to Count III, judgment in favor of Plaintiff Beverly Enterprises, Inc. and against Defendant Rosemary Trump in a sum in excess of $75,000.00, plus legal interest and costs; and

IV. As to all Counts, for such other and further legal and equitable relief as this Court may deem just and proper under the premises.

Respectfully submitted,



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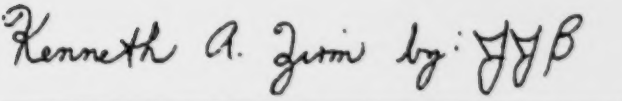

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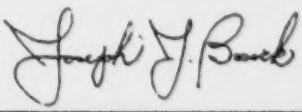
**JURY DEMAND**

Plaintiffs hereby demand a trial by jury.



Joseph J. Bosick (P.A.I.D. #17241)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BEVERLY ENTERPRISES, INC,
5111 Rogers Avenue
Fort Smith, Arkansas 72919

and

DONALD L. DOTSON,
5111 Rogers Avenue
Fort Smith, Arkansas 72919
Plaintiffs,

vs.

SERVICE EMPLOYEES
INTERNATIONAL
UNION, LOCAL 585,
237 6th Street
Pittsburgh, Pennsylvania 15218
Defendant.

Civil No.:

## COMPLAINT FOR DAMAGES

NOW COME the Plaintiffs Beverly Enterprises, Inc. and Donald L. Dotson and, for their Complaint against Defendant Service Employees International Union, Local 585, state as follows:

## PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Beverly Enterprises, Inc. (hereinafter "Beverly") is a corporation with its principal place of business located at 5111 Rogers Avenue, Fort Smith, Arkansas.

2. Plaintiff Donald L. Dotson (hereinafter "Dotson") is an individual of the full age of majority and a resident of the State of Arkansas.

3. Defendant Service Employees International Union, Local 585 (hereinafter "Local 585") is an unincorporated labor organization with its principal place of business located at 237 6th Street, Pittsburgh, Pennsylvania.

4. Rosemary Trump (hereinafter "Trump"), at all times relevant to the facts giving rise to this dispute, served as President of Local 585.

5. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1332 in that complete diversity of citizenship exists between all Plaintiffs and all Defendants and the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

6. Venue is proper in this Court pursuant to 28 U.S.C. §1391(a)(1) in that all defendants reside in this judicial district and pursuant to 28 U.S.C. §1391(a)(2) in that a substantial portion of the events or omissions giving rise to this action occurred within this judicial district.

## GENERAL BACKGROUND ON BEVERLY AND THE SEIU

7. Beverly is the nation's largest private provider of nursing home care.

8. Beverly and the Service Employees International Union (hereinafter "SEIU") have been embroiled in a long-standing dispute over the SEIU's representation of Beverly employees. The dispute finds its origins in the mid-1980s when the SEIU first targeted Beverly homes for unionization.

9. During the course of its efforts to unionize Beverly employees, the SEIU has filed innumerable unfair labor practice charges against Beverly with the National Labor Relations Board (hereinafter "NLRB"). Included among these were a series of charges dating back to 1986 that led to a decision by the NLRB *In re Beverly California Corp.*, 310 NLRB No. 37 (1993), commonly known as "Beverly I." The Administrative Law Judge rendered his decision in Beverly I on November 9, 1990. The NLRB issued its decision on January 20, 1993. The Second Circuit, in *Torrington Extend-A-Care Employee Assoc. v. National Labor Relations Board,* 17 F.3d 580 (2d Cir. 1994), reversed the NLRB's decision and remanded the case for further proceedings on February 28, 1994.

10. After realizing that traditional union activities would not be effective in its dealings with Beverly, the SEIU, during the 1980s, decided to launch a "corporate campaign" against Beverly. Such campaigns are designed to use external pressure on a company and its top policy-makers through non-traditional union tactics in order to influence the company's strategic business decisions.

11. Among the many tactics used in a corporate campaign are attacks on the management of the company designed to discredit the company. In the case of Beverly, in addition to its efforts to impugn management, the SEIU has falsely portrayed Beverly as anti-worker, anti-consumer, unsafe

and greedy; appealed to government agencies to investigate alleged bad practices; petitioned legislators to bring political pressure to bear upon the company; and used media strategies to encourage repetition of false and defamatory articles.

12. The SEIU's goals in implementing its corporate campaign against Beverly were two-fold. First, the SEIU wanted Beverly to capitulate into recognizing its local affiliates, without representation elections conducted by the NLRB and to deprive Beverly employees of their right to choose freely whether they wish to be represented by the SEIU. Second, the SEIU wanted to bring economic pressure to bear on Beverly using non-traditional means to coerce Beverly into agreeing to terms and conditions of collective bargaining agreements that Beverly would not otherwise have agreed to in the face of traditional labor pressures such as strikes.

## BACKGROUND ON BEVERLY AND THE SEIU IN PENNSYLVANIA

13. Beverly subsidiaries own and/or operate forty-two nursing home facilities in Pennsylvania. Of those forty-two nursing homes, twenty have employees that are represented by local affiliates of the Service Employees International Union, either District 1199P, Local 585, and Local 688.

14. The last of the Collective Bargaining Agreements covering Beverly's unionized Pennsylvania nursing homes expired on November 30, 1995. Following the expiration of that agreement, Beverly and the SEIU engaged in collective bargaining, but initially were unable to agree on the terms and conditions of a new Collective Bargaining Agreement. During these negotiations, the SEIU continued to wage its corporate campaign against Beverly in an effort to force Beverly to agree to terms proposed during the negotiations.

15. One of the principal aims of the SEIU during these negotiations was to obtain a master contract that would apply to all unionized Beverly homes in Pennsylvania. Beverly was not amenable to this proposal, preferring instead to have individual agreements that were tailored to suit the specific needs of each facility. Indeed, since early Fall of 1995 each Beverly unionized facility had in place a negotiating team that repeatedly sought facility-specific negotiations. Notwithstanding, the SEIU appointed one Chief Negotiator for all twenty facilities, had a "state-wide" bargaining committee composed of representatives from all twenty facilities, and avowedly sought a "Master Contract" to cover all twenty facilities.

16. On March 15, 1996, the SEIU gave notice to Beverly of its intention to engage in a three-day strike. Although the ostensible basis for the strike was to protest unfair labor practices, the three-day strike was, in fact, simply another component of the SEIU's corporate campaign and was done principally in the hope that it would force Beverly to accede to the SEIU's demands at the bargaining table.

17. Under §8(g) of the National Labor Relations Act, the SEIU was required to give ten days advance notice of its intended strike so that Beverly could make arrangements for temporary employees to ensure that essential health care services to its residents were not adversely affected by the strike.

18. The notice initially received by Beverly indicated that the strike would commence at 7:00 a.m. on Friday, March 29, 1996. Subsequently, at the last minute, on Wednesday, March 27, 1997, Beverly received notice that the commencement of the strike had been postponed until 6:00 a.m. on Monday, April 1, 1996. The sudden change interfered with the arrangements that Beverly had made for temporary employees. In addition, because the second notice arrived only five days before the strike, it failed to provide the required ten-days notice and thus the strike was unlawful. Beverly advised the SEIU that the second notice did not fulfill the requirements of §8(g) and that it would consider any strike held pursuant to the second notice to be unlawful. Despite Beverly's lack of consent to the notice, on April 1, 1996, at 7:00 a. m., fifteen of the twenty unionized facilities were struck.

19. Once the strike commenced, Beverly engaged permanent replacement workers in order to ensure that critical health care services were not interrupted to its residents or their welfare jeopardized during the strike. At the conclusion of the strike, when the strikers offered to return to work, Beverly concluded that its was more appropriate from a business standpoint for the replacement workers to remain in their positions and for the company to recall former workers on an as-needed basis. Between April 1996 and January 1997, Beverly recalled approximately 290 of the strikers to their former positions and another 237 were recalled to different positions.

20. Nevertheless, on July 8, 1996, the NLRB filed a §10(j) injunction action against Beverly, seeking an order directing it to recall all of the strikers to their former positions. On April 4, 1997, the United States District Court for the Western District of Pennsylvania concluded that

Beverly should, in fact, recall the former strikers. That decision is now on appeal to the United States Court of Appeals for the Third Circuit.

21. After extensive negotiations, Beverly and the SEIU were able to reach agreement, in early June 1997, on new Collective Bargaining Agreements at all Beverly nursing homes with employees represented by the SEIU. Beverly, however, continues to remain the target of a corporate campaign by the SEIU.

## BACKGROUND ON DOTSON AND THE ETHICS IN GOVERNMENT ACT

22. In 1982, Dotson was nominated by President Ronald W. Reagan to serve as Chairman of the NLRB. On February 18, 1983, the United States Senate confirmed Dotson's nomination, and he assumed his duties immediately thereafter.

23. Prior to his nomination to be Chairman of the NLRB, Dotson had served as Assistant Secretary of Labor for Labor-Management Relations. Before entering government service, Dotson had been Chief Labor Counsel for Wheeling-Pittsburgh Steel Corp., Labor Counsel for Westinghouse Electric Corp., and Labor Counsel for Western Electric Co.

24. As an employee of the federal government, Dotson was subject to the provisions of the Ethics in Government Act, which is codified in part at 18 U.S.C. §§207, 208, and 216. Among others things, the Act imposes restrictions on the scope of former government employees' post-government service employment. In particular, the Act permanently prohibits former government employees from knowingly making appearances before any government representative or agency in matters on which the former employee was personally and substantially involved; prohibits former government employees for a period of two years from knowingly making appearances before any government representative or agency in a matter that was pending under the former employee's official responsibility for the one-year period prior to his departure from government service; restricts senior employees of the executive branch for one year after they leave government service from knowingly making appearances before any government representative or agency in which the former employee seeks official government action; and restricts the conditions under which government employees may negotiate for post-government employment. Violations of the Act are felonies, punishable by up to five years imprisonment for a willful violation and a fine of up to $50,000.00.

25. In their current form, those provisions provide in pertinent part as follows:

**§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches**

> **(a) Restrictions on all officers and employees of the executive branch and certain other agencies.** (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) in which the person participated personally and substantially as such officer or employee, and
> >
> > (C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.
>
> (2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 or this title.

***

**(c) One-year restriction on certain senior personnel of the executive branch and independent agencies.** (1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

**§ 208. Acts affecting a personal financial interest**

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . in which, to his knowledge, any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest —

Shall be subject to the penalties set forth in section 216 of this title.

**§ 216. Penalties and injunctions**

(a) The punishment for an offense under section . . . 207, 208 . . . of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

> (b) The Attorney General may bring a civil action . . . against any person who engages in conduct constituting an offense under section . . . 207, 208 . . . of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

26. Dotson's tenure as Chairman of the NLRB ended on December 16, 1987.

27. Dotson entered the private practice of law as a partner with Keck, Mahin & Cate in Washington, D.C. on December 17, 1987.

28. In May, 1991, Dotson accepted employment with Beverly as its Vice-President and Deputy General Counsel and subsequently became its Senior Vice-President for Labor and Employment.

29. At all times relevant to the events described hereinafter, Dotson continued in his capacity as Beverly's Senior Vice President for Labor and Employment.

## COUNT I — DEFAMATION

30. Plaintiffs incorporate, as if fully rewritten herein, the allegations of Paragraphs I through 29, inclusive.

31. The SEIU persuaded several members of the minority Democratic party in the United States Congress to whom it has given support in the past to convene an informal "town hall" meeting in the Allegheny County Courthouse on May 19, 1997 to hear unsworn statements concerning H.R. 1624, the "Federal Procurement and Assistance Integrity Act," a bill proposed by the ranking minority member of the House Veterans Affairs Committee.

32. The true purpose of this "town hall" meeting was to provide a forum designed solely to attack Beverly and assist the SEIU in their campaign to cause economic harm to Beverly and its nursing homes in Pennsylvania.

33. On May 15, 1997, H.R. 1624 was referred to the House Committee on Government Reform and Oversight, and to the House Committee on Education and the Workforce. None of the members of Congress present at

the May 19 "town hall" meeting are members of either of the Committees to which this bill had been assigned.

34. To date, no Congressional committee or subcommittee hearings have been held on H.R. 1624, and none are scheduled.

35. The May 19, 1997 "town hall" meeting was not an official Congressional hearing, but was simply an informal meeting organized by the SEIU and several members of the minority party in Congress to hear statements from invited speakers on how H.R. 1624 would affect Beverly's existing contracts with the Veteran's Administration and why causing economic harm to Beverly would be a good thing for the SEIU.

36. Defendant Trump was one of the persons invited to appear and speak during the "town hall" meeting, and she did so both in her individual capacity and as President of SEIU Local 585.

37. During the "town hall" meeting, Trump delivered a statement and responded to questions from the Members of Congress in attendance.

38. Among the questions to and answers by Trump was the following:

> CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?
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> MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple

affect in the entire industry and the whole industry will operate nonunion.

That's my opinion, of course. I can't obviously produce any evidence to that effect, but the reality is that since the former Chairman of the National Labor Relations Board, Don Dotson, and the former general counsel of the National Right to Work Committee was hired by Beverly in the last three-year period, it's been very clear that this is not about business, this is about ideology and the ideology is, frankly, is to pretend that the National Labor Relations Act passed in 1935 never happened. (emphasis added)

39. The ''gist'' or ''sting'' of Trump's statements concerning Dotson include that Dotson may have negotiated for employment with Beverly during his tenure as Chairman of the NLRB in criminal violation of federal ethics laws described above and that Dotson, following his departure from government employment, engaged in criminal and other activities prohibited by federal ethics and labor laws by representing Beverly in matters that had been pending before the NLRB during his Chairmanship in violation of federal ethics laws described above.

40. The ''gist'' or ''sting'' of Trump's statements concerning Beverly include that Beverly aided and abetted a criminal conspiracy by helping Dotson to engage in criminal and other activities in violation of federal ethics and labor laws described above.

41. Trump's statements concerning the circumstances of Dotson's employment with Beverly and Beverly's employment of Dotson are false and defamatory and/or imply false and defamatory statements of fact concerning Dotson and Beverly.

42. Trump's statements accuse Dotson and Beverly of criminal and other conduct in violation of the Ethics in Government Act, and other federal labor laws, as described above and, as such, are defamatory *per se* under applicable Pennsylvania law.

43. Trump's statements were made without privilege, be it statutory, common law, or constitutional in nature.

44. Trump's defamatory statements concerning Dotson are not protected expressions of opinion because they are based on the existence of objectively provable facts, and even if Trump's statements were considered ''opinion,'' they are nevertheless actionable because they imply the existence of undisclosed defamatory facts.

45. Trump's statements were made to the members of Congress and to the members of the general public assembled at the "town hall" meeting, as well as to a cable television audience, and were understood by those recipients to be of and concerning Dotson and Beverly. Furthermore, the recipients understood the defamatory meaning of the Trump's statements.

46. Trump acted with constitutional malice in making the defamatory statements at issue, in that she made such statements either with actual knowledge of the falsity of those statements or with reckless disregard as to the truth of those statements.

47. Local 585 is liable for Trump's statements as they were made by her both individually and within the scope of her duties as President of SEIU Local 585, which authorized, approved and ratified Trump's statements. Trump's statements were consistent with the SEIU's corporate campaign tactic of attacking management in an attempt to discredit the Company.

48. On August 15, 1997, Plaintiffs Beverly and Dotson filed suit in this Court against Trump, in her individual capacity, alleging, *inter alia,* that her statements made at the "town hall" meeting were false and defamatory and had caused damage to Plaintiffs.

49. The current collective bargaining agreement between Beverly and Local 585 contains an alternative dispute resolution provision which requires each party to give the other thirty (30) days' notice prior to instituting legal action. Thus, on September 5, 1997, Plaintiff Beverly sent a letter to SEIU Local 585, notifying Local 585 of the lawsuit against Ms. Trump and informing the Union of Beverly's belief that Ms. Trump's statements were authorized and approved by Local 585. Beverly informed the Union of its intent to sue Local 585 for Ms. Trump's "town hall" meeting statements unless the Union publicly repudiated those statements. A copy of said letter is attached hereto as Exhibit "A". To date, the Union has neither resolved the dispute through alternative dispute resolution nor has SEIU Local 585 repudiated Ms. Trump's statements.

50. As a proximate result of Trump's statements, made by Trump both individually and with the authorization, approval and/or ratification of Local 585, Dotson and Beverly have sustained damage to their reputations and good names in an amount to be established at the trial of this matter.

51. Trump's defamatory statements about Dotson and Beverly, made by Trump both individually and with the authorization, approval and/or ratification of Local 585, were made willfully, maliciously, in bad faith,

with ill will, wantonly and recklessly, and with actual malice. Therefore, Dotson and Beverly demand punitive damages from Local 585.

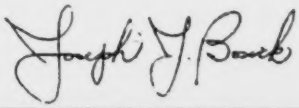
**WHEREFORE,** Plaintiffs Donald L. Dotson and Beverly Enterprises, Inc. respectfully request that this Honorable Court grant them the following relief:

I. Judgment in favor of Plaintiff Donald L. Dotson and against Defendant SEIU Local 585 in a sum in excess of $75,000.00, plus legal interest and costs;

II. Judgment in favor of Plaintiff Beverly Enterprises, Inc. and against Defendant SEIU Local 585 in a sum in excess of $75,000.00, plus legal interest and costs; and

III. For such other and further legal and equitable relief as this Court may deem just and proper under the premises.

Respectfully submitted,



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Attorneys for Plaintiffs

**JURY DEMAND**

Plaintiffs hereby demand a trial by jury.

Joseph J. Bosick

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| BEVERLY ENTERPRISES, INC., and DONALD L. DOTSON, Plaintiffs, v. ROSEMARY TRUMP, Defendant. | Civil No. 97 1490 |

**AFFIDAVIT OF ROSEMARY TRUMP**

I, Rosemary Trump, being duly sworn, state that I have personal knowledge of the following:

1. I am the Defendant in this action.

2. I am the President of Service Employee International Union, Local 585.

3. In this capacity, I participated in collective bargaining with Beverly Enterprises, Inc. concerning the terms and conditions of employment of employees employed in 20 Beverly nursing homes in Pennsylvania.

4. In June of 1997, the parties reached agreements concerning the 20 homes. As part of the settlement of the individual contracts, the parties entered into an alternate dispute resolution agreement. A true and correct copy of that agreement is attached hereto as Exhibit 1.

5. After the filing of this action, my counsel sent the letter attached hereto as Exhibit 2 to Plaintiffs' counsel.

6. After finding of the action, Beverly's counsel sent the letter attached hereto as Exhibit 3 to Local 585.

7. A true and correct copy of Beverly's response to Exhibit 2 is attached hereto as Exhibit 4.

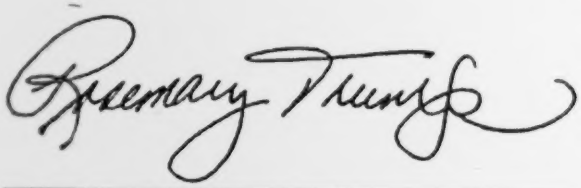
8. A true and correct copy of Local 585's response to Exhibit 3 is attached hereto as Exhibits 5 and 6.

9. A true and correct copy of Beverly's response to Exhibits 5 and 6 is attached hereto as Exhibit 8.

10. The congressional field hearing on H.R. 1624 that is at issue in Count II of the Complaint in this action was taped by Pennsylvania Cable Network. The Service Employees International Union purchased a copy of the tape which is attached hereto as Exhibit 9. The tape accurately records the hearing.

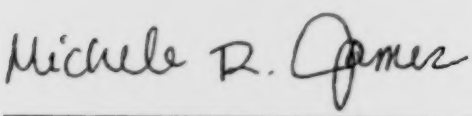
11. The tape or portions of it was shown on cable television.

The foregoing is true and correct to the best of my knowledge.



ROSEMARY TRUMP

**SWORN to and SUBSCRIBED**
**before me this 15th day**
**of October, 1997.**



**NOTARY PUBLIC**